Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 2006

JOSEPH J. MIEDZIANOWSKI
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of Certiorari Appeal to The United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court erred in allowing the instruction as to an Illinois extortion statute which does not exist to be the predicate to a federal crime.

II. Whether the appellate court correctly interpreted the district court's position on limited remand pursuant to *U.S. v. Paladino* wherein the district court failed to address the presumption of reasonableness when imposing a guideline sentence and the reasons therefore.

III. Whether the appellate court erred in upholding defendant's guideline sentence of life as being reasonable in view of the fact that it's finding was based upon a premise upon which there is an intra-circuit conflict

PARTIES INVOLVED

The parties to the proceedings below were Joseph J. Miedzianowski, Defendant-Appellant in case numbers consolidated under No. 02-2871, 02-3238, 02-4193, 03-1270, 03-1446 Juan Miranda, co-defendant, Lissett Rivera, co-defendant, Omar Feliciano, co-defendant, Alina Lis, co-defendant, and United States Attorney General, Plaintiff-Appellee.

The parties to this petition are Petitioner, Joseph J. Miedzianowski, and the Respondent, the United States Attorney General.

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III. Whether the appellate court erred in upholding defendant's guideline sentence of life as being reasonable in view of the

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IN THE
SUPREME COU[illegible]OF THE UNITED STATES

JOSEPH J. MIEDZIANOWSKI, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO The United States Court of Appeals for the Seventh Circuit

Petitioner, Joseph J. Miedzianowski respectfully requests that a writ of certiorari issue to review the judgment and order of the United States District Court of Appeals of the Seventh Circuit entered on February 23, 2006, affirming petitioner sentence for life plus five years for the crimes of racketeering, robbery, money laundering, bribery, kidnapping, extortion, gun violation and conspiracy to possesses with intent to deliver.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit was not published pursuant to rule 53. The order is reprinted in Appendix A, attached hereto and incorporated herewith.

The memorandum order of the Northern District of Illinois on limited remand was is reprinted in Appendix B, attached hereto and

incorporated herewith.

The final order of the United States Court of Appeals for the Seventh Circuit was not published pursuant to rule 53. The order is reprinted in Appendix C, attached hereto and incorporated herewith and was entered on February 23, 2006.

JURISDICTION

The final judgment of the Seventh Circuit court of Appeals in, *United States v.* Miedzianowski was entered in an order filed on February 23, 2006 affirming Defendants sentence after a limited remand to revisit the length of the sentence the court earlier affirmed defendants conviction and sentence by an order entered on February 23, 2006.

The jurisdiction of this Court to review the judgment of the Appellate Court is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, exeept in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On December 15, 1998, Defendants Joseph Jerome Miedzianowski, Joseph DeLeon, Alina Lis, Yolanda Navarro, Mohammed S. Omar, Rolando Otero, Nelson Padilla, Marvel L. Passley, Frederick G. Rock, and David Ruiz were arrested on charges of conspiracy to possess with intent to distribute cocaine; in violation of 21 U.S.C. §846. The government ultimately filed six superseding indictments against the defendants.

Count one of the sixth superseding indictment charges that, from about 1985 until in or about 1998, Defendants Miedzianowski, Omar and Galligan, charged the defendant and several co-conspirators with racketeering in violation of 18 U.S.C. § 1962(c), 21 U.S.C. §§846 and 841(a)(1); robbery and extortion, in violation of 18 U.S.C. § 1951; money laundering, in violation of 18 U.S.C. § 1956; and, robbery, kidnapping, extortion and bribery, in violation of the Illinois statutes. It was part of the conspiracy that the defendants obtained controlled substances, property, and money from drug dealers through robbery, extortion, kidnapping and deception; fraudulently obtained and falsified official documentation; dealt in controlled substances; failed to enforce the law against conspirators, associates and individuals who aided and assisted them; provided conspirators and associates with confidential information about law

enforcement activity; corruptly interfered with the investigation and prosecution of conspirators and their associates, and; unlawfully obtained from drug dealers money and property, which was provided by the dealers in the belief that the conspirators had the ability to affect the outcome of criminal cases against them and their associates. All this was in violation of 18 U.S.C. §1962(d). The remaining counts charged the various predicate acts alleged in the racketeering counts individually against Miedzianowski and others.

The government built its case against defendant-appellant Miedzianowski using testimony of alleged co-conspirators and audio tapes. The first to testify was Juan Martir allegedly third-in-command of the Imperial Gangsters street gang. At the time of trial he was serving time for drug violations. Facing 30 years to life he received 180 months as a result of his plea bargain. When not in prison he made his living selling cocaine. He testified he purchased cocaine in Miami and shipped it to Chicago using various carriers. He identified defendants Alina Lis Lissett Rivera and Nelson Padilla as couriers . Mohamed Omar, Jr, was another dealer he used. He stated that when arrest in 1998, he was involved in narcotics trafficking with defendant-appellant - Miedzianowski involving kilo quantities of cocaine and Miedzianowski also provided protection to his organization by alerting him to people that were cooperating against them.

During the course of the trial various co -

defendant testified to having participated in Illegal activities with the Defendant Miedzianowski which were the predicate acts for the RICO indictments, including the conspiracy to sell narcotics, extortion, and robbery, all which were denied by Miedzianowski.

Martir moved to Miami, and Yolanda Navarro, another co-defendant, took over Martir's Chicago customers.

Martir rented an apartment on Kentucky and Lawrence to use as a stash house. He let Lis and co-defendant Lissett Rivera live there. Lis recruited Rivera to be a courier. Martir and Frank Figueroa (another co-defendant) stored cocaine at the Kentucky apartment and cooked cocaine in the presence of Lis.

Martir bought a Pontiac for Lis with a hidden compartment sometime in 1997. In 1997 gunmen robbed Lis and Navarro at an apartment on Lovejoy and took drugs stashed there. Lis and Navarro informed Martir and Miedzianowski of the robbery

The next co-defendant to testify was Figueroa. He said he knew Martir for about 16 years and accompanied him weekly to a the Mega Mall to obtain drugs from OmarFeliciano.

In late 1994, during a visits to the Mega Mall, he claimed overheard a conversation between Padilla, Martir and Omar concerning a robbery of a Mexican of 10 kilos of cocaine and that

Miedzianowski was involved. He stated also observed Miedzianowski, Lis, Navarro and Martir in Martir's apartment on Foster when Martir was packaging cocaine. And observed Lis and Navarro moving drugs in and out of a secret compartment in a car driven by Navarro.

He further stated Miedzianowski asked Figueroa to cook cocaine for him and Lis at Lis' new apartment; alleging he obtained drugs from Miedzianowski and cooked it several times at the Bryn Mawr apartment. A sweep and test of that apartment by the government using very sensitive tests and equipment found no evidence of drugs using very sensitive tests and equipment. Defendant-Appellant presented expert testimony that their were never any drugs cooked in the apartment.

Cynthia Rodriguez testified she lived with Martir from November of 1995 to May of 1996 and saw him selling drugs to customers from the apartment and knew he was a drug dealer. She stated she heard Martir say he obtained drugs he sold from Mie anowski and Omar. She moved in with him in 1994 and while she lived with him learned he obtained drugs from Omar and saw Martir pass money to Omar for drugs on three or four occasions. She also claimed to have delivered drugs to Miedzianowski.

Rolando Otero introduced Darrell Johnson to Martir. Johnson did several drug deals with Martir

with Otero acting as middleman. He stayed at the Foster Ave. apartment with Lis for about a month and one-half. During that time he observed Lis go to Florida five or six times and picked her up at the airport once. He later participated in the robbery at Lovejoy of Lis and Navarro.

Juan Miranda is Martir's cousin, who recruited him into his drug organization. He said he was told by Miranda that he had a cop protecting his operation. Miranda stated he observed several drug transactions and acted as a courier for Martir; on three occasions bringing cocaine from Florida, giving the drugs to Navarro, and bringing money to Martir.

Joseph DeLeon stated in April 1996 he began selling cocaine bought from Martir who introduced him to Miedzianowski as a cop who could protect him. Miedzianowski helped him after his arrest for mob action. The case was stricken. He also described another time when Miedzianowski helped DeLeon's brother Angel get a case dismissed . On one occasion Miedzianowski saved him $5,250.00 he owed Omar for "garbage" cocaine. He gave Miedzianowski $2,500.00 for this service.

Rico Passley said he met Miedzianowski through Martir in 1996 and became an informant for Miedzianowski who gave him narcotics. He also received cocaine from Lis on two occasions.

Rolando Otero said he was arrested for illegal

possession of a firearm in the summer of 1994 with Padilla who called Miedzianowski and they were then released. He claimed to have also received 200 pounds of marijuana from Miedzianowski for resale and paid him $1,000 for a fake bond slip he needed to deceive an individual called Nacho.

Jesus Cuevas testified that he first met Miedzianowski in 1987. Miedzianowski offered him a deal; if Cuevas would identify locations of drugs, Miedzianowski would raid those places and give Cuevas a cut of the drugs and other items he would confiscate. He said on several occasions he gave Miedzianowski information on the location of drugs for which Miedzianowski rewarded him with drugs and jewelry.

In the summer of 1996, Juan Martir introduced his brother Orlando to Miedzianowski. Juan told Orlando Miedzianowski would help him if he ever got into trouble. Orlando carried money to Miami and drugs from Miami on two occasions for Juan in 1997. On one of his return trips from Miami, Jolie and Lis picked him up at the airport. Lis opened a secret compartment in the car driven by she and Padilla and put the kilos in the compartment. Back at the apartment on Foster Yolanda paid him $2,000.00.

On a third occasion Orlando brought drugs from Miami to Chicago and was paid $2,000.00 by Yolanda. A couple days later he went to the Lovejoy apartment to get money to bring back to Miami. He said Lis and Miedzianowski were in the kitchen.

Yolanda strapped money to his legs and he asked Miedzianowski how it looked.

In the fall of 1996 Juan Martir (referred to as Martir for the balance of the facts section) recruited David Miranda to transport drugs for him. Rodriguez and Padilla were present. Yolanda Navarro and Lis met him at the Chicago airport. Lis put the cocaine in the secret compartment that Navarro opened. On the return trip Lis strapped money on him. He made approximately three more trips for Martir.

Fred Rock, another co-conspirator, claimed he met Miedzianowski in 1990, through Hector Hernandez. Miedzianowski arrested Hernandez who allegedly offered to help him if he would help him rob drug dealers. In 1994 and other times Rock said he actually participated in those robberies describing several other instances where Miedzianowski robbed other dealers. He observed Lis cooking crack at the Lovejoy apartment on one occasion and described the robbery at the Lovejoy apartment. The robbers ordered Lis to open the stash in the bathroom. She said she didn't know what they were talking about. Navarro then opened the stash. It was claimed that after the robbers left, Lis called Miedzianowski to report the robbery who came over and using Navarro's phone ordered Otero to return everything by 5:00 p.m.

Miedzianowski's testimony described his progress in the ranks of the Chicago Police

Department, when in 1986 he became a gang crimes specialist. He explained how he would infiltrate the gangs, exchange favors for information, misinform the leaders and generally gather intelligence on the 75 or so gangs in the city. Tape recordings that were played were records of how he did his job. He developed a romantic relationship with Lis and he found her useful as an informant because she knew some of the drug dealers through her care of Dennis Martir. She had no involvement in drug activities.

Miedzianowski denied involvement in any robberies, rip-offs or any other scheme described by the various defendant-witnesses All he got from those witnesses was information and never protected them. In fact they all were arrested.

Robert Moriarty an expert chemist testified that after reviewing the government chemist's reports of the sweep of the Bryn Mawr apartment and the blue Pontiac, it was clear that no cocaine was present. The initial sweeps were done by the government, not he.

Brian Cockrell, Lis's former boyfriend, testified drug paraphernalia found in the storage locker under Lis' name was his and Lis let him keep his stuff there after he was arrested.

Alina Lis corroborated that Brian Cockrell left those things with her after his arrest. She testified that he was a drug user and broke up with him

because of it. Lis denied ever living at the apartments on Foster, Lovejoy and Kentucky. She denied knowledge of the drug dealings of the other co-defendants. She took care of Dennis, the son of Yolanda and Martir and Yolanda's daughter Lizahira and would often see Martir and his friends. However, they spoke mostly in Spanish which she did not understand.

Lis admitted to making three to five trips to Miami to bring Dennis to see his father and once s a music show at Martir's expense. She denied any drug courier activity or receiving money for drug-related activities or preparing couriers.

Miedzianowski was convicted by a jury and sentenced to life under the guidelines plus five years for a gun violation, which sentence was affirmed by the appellate court after a limited remand to the district court produced the same sentence.

REASONS FOR GRANTING CERTIORARI

I. Whether the District Court erred in allowing the instruction as to an Illinois extortion statute which does not exist to be the predicate to a federal crime?

The standard of review in the appellate court was *de novo. U.S. v. Wagner*, No. 02-1257 (7th Cir, 2003) The court erred in not sustaining the defendant's objection to government instruction No.41 which reads as follows:

> A person violates the Illinois extortion statute when, with intent to cause another to perform or to omit the performance of any act, he communicates to another...a threat to perform without lawful authority, any of the following acts:
>
> (1) inflict physical harm on the person threatened or any other person; or
>
> (2) subject any person to physical confinement or restraint; or
>
> (3) accuse any person of an offense; or

(4) take action as a public official against anyone or anything, or cause such action.

The government's theory was to equate intimidation with extortion and create its own version of the law. This instruction is totally improper and has no basis in statute, case law, or suggested 7th Circuit instructions and for those reasons it is wholly without merit, unlawful and as a matter of law, should not have been given to the jury.

The instruction refers to an "Illinois extortion statute" which does not exist under Illinois law. This is disingenuous no matter how one tries to justify the terminology. And, as a matter of law, gives rise to reversal of count three of the sixth superseding indictment. The court ultimately after lengthy discussion relative to this instruction gave same over defense objection basing its conclusion on a definition of "extort" in Black's dictionary.

II. Whether the appellate court correctly interpreted the district court's position on limited remand pursuant to *U.S. v. Paladino* wherein the district court failed to address the presumption of reasonableness when imposing a guideline sentence and the reasons therefore.

The appellate court erred when it ruled that the fact the district judge did not address the 28 USC §3553(a) factors at Miedzianowski sentencing in the February 23, 2006 order and

stated it was understandable in *United States v. Booker*, 125 S.Ct. at 764-765. It further erred in finding that such failure to address these factors by the court was understandable because it occurred before *United States v. Booker*, 125 S.Ct. at 764-765. The Court held that, that does not turn a reasonable sentence into plain error citing *United States v. Dean*, 414 F.3d 725 (7th Cir. 2005).If such were to be the case there would hardly be a circumstance in which a defendant being sentencing post *Booker* while his case was still pending would receive a lower sentence.

III. Whether the appellate court erred in upholding defendant's guideline sentence of life as being reasonable in view of the fact that it's finding was based upon a premise upon which there is an intra-circuit conflict

A. Guidelines sentence is not automatically reasonable.

In addition to the Sentencing Guidelines, district courts must now consider the purposes of sentencing set forth in 18 U.S.C. §3553(a). *United States v. Booker*, 125 S.Ct. at 764-765.

This Court stressed the mandatory nature of 18 U.S.C. §3553(a) and the advisory nature of the Guidelines. It noted that:

the defendant must be given an opportunity to draw the judge's attention to any factor listed in section 3553(a) that might warrant a sentence different from the guidelines sentence, for it is possible for such a variant sentence to be reasonable and thus within the sentencing judge's discretion under the new regime in which the guidelines, being advisory, can be trumped by section 3553(a), which as we have stressed is mandatory. *United States v. Dean*, 414 F.3d 725, 730-731 (7th Cir. 2005).

Immediately after that statement, this Court cited, with approval, three district court opinions that rejected the government's position that the Guidelines are entitled to presumptive or heavy weight. *Id.*, citing *United States v. Ranum*, 353 F.Supp.2d 984, 985-986 (E.D. Wis. 2005) (finding that, under *Booker*, the Guidelines are just one of a number of sentencing factors); *United States v. Kelley*, 355 F.Supp.2d 1031, 1035-1037 (D. Neb. 2005) (refusing to afford the Guidelines a presumption of reasonableness in every case); *Simon v. United States*, 361 F.Supp.2d 35, 39-41 (E.D. NY 2005) (adopting the view that the Guidelines

> are entitled to the same weight as other §3553(a) factors). Therefore, this Court has effectively rejected the position that a Guidelines sentence is automatically reasonable.

In apparent contrast, on the same day that the *Dean* decision was issued, a different panel of this Court held, in *Mykytiuk* that a Guidelines sentence is entitled to a rebuttable presumption of reasonableness. The *Mykytiuk* panel found that "[t]he defendant can rebut this presumption only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in §3553(a)." *United States v. Mykytiuk*, 415 F.3d 606, 607-608 (7th Cir. 2005). If the language in *Mykytiuk* is taken literally, this Court has created an intra-circuit conflict.

In addition, a literal reading of *Mykytiuk* would conflict with *Booker*. Such a reading would have the effect of making the Guidelines mandatory, unless the defendant can show that his sentence should be outside the Guidelines. That would not be any different than the pre-*Booker* situation of the Guidelines being mandatory with narrow exceptions for departures. The merits majority in *Booker* found that sentencing scheme unconstitutional. *United States v. Booker*, 125 S.Ct. at 746. That is why two other circuits declined to hold that a sentence within a Guidelines range is per-se reasonable. The Second Circuit found that:

> Because "reasonableness" is inherently a concept of flexible

> meaning, generally lacking precise boundaries, we decline to fashion any per se rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline. Indeed, such per se rules would risk being invalidated as contrary to the Supreme Court's holding in *Booker/Fanfan*, because they would effectively re-institute mandatory adherence to the Guidelines.

United States v. Crosby, 397 F.3d 103, 115 (2nd Cir. 2005). The Eighth Circuit also found that accepting an

> argument, that the range of reasonableness is essentially co-extensive with the Guidelines range, would effectively render the Guidelines mandatory. We have been directed to review a sentence for reasonableness based on all the factors listed in §3353(a)(6). The Guidelines range is merely one factor. We cannot isolate possible sentencing disparity to the exclusion of all the other §3553(a) factors.

United States v. Winters, 416 F.3d 856, 861 (8th Cir. 2005). *See also*: *United States v. Myers*, 353 F.Supp.2d 1026, 1028-1029 (S.D. Iowa 2005);

United States v. Huerta-Rodriguez, 355 F.Supp.2d 1019, 1023, 1025 (D.Neb. 2005); *United States v. Jaber*, 362 F.Supp.2d 365, 371-376 (D.Mass. 2005) (extensively explaining the problems with presuming that a Guidelines sentence is reasonable); *United States v. Pacheco-Soto*, 386 F.Supp.2d 1198, 1203 (D.N.M. 2005) (following *Ranum*).

Another Eighth Circuit decision and decisions from the Fifth and Eleventh Circuits have either implicitly or explicitly agreed with *Mykytiuk*. However, those decisions suffer from the same defects in relation to *Booker*. *United States v. Shannon*, 414 F.3d 921, 924 (8th Cir. 2005) (stating that "the sentence imposed was consistent with the now-advisory guidelines, and this is generally indicative of reasonableness"); *United States v. Alonzo*, 4__ F.3d ___, 2006 U.S. App. LEXIS 447, *8 (5th Cir. Jan. 9, 2006) (agreeing with *Mykytiuk*); *United States v. Talley*, 431 F.3d 784, 788 ("ordinarily we would expect a sentence within the Guidelines range to be reasonable."). *See also*: *United States v. Wilson*, 350 F.Supp.2d 910, 913-925 (D. Utah 2005); *United States v. Wilson II*, 355 F.Supp.2d 1269 (D. Utah 2005); *United States v. Wanning*, 354 F.Supp.2d 1056, 1059-1063 (D. Neb. 2005); *United States v. Peach*, 356 F.Supp.2d 1018, 1020-1022 (D. N.D. 2005); *United States v. Perry*, 389 F.Supp.2d 278, 299 (D. RI 2005) (affording the Guidelines a presumption of reasonableness).

In light of *Cunningham*, it appears that this

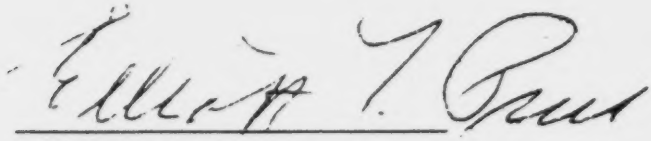
Court may have merely intended to express a standard of review on appeal in *Mykytiuk* , rather than holding that a district court should normally impose a sentence within a Guidelines range. However, even if that is true, the holding of *Mykytiuk* will still have the same improper effect on district courts. It sends the message that a sentence within the Guidelines will never be reversed if a district court considers the other 28 USC §3553(a) factors. At the same time, there is no similar assurance for a non-Guidelines sentence. Thus, district courts that are concerned about being reversed on appeal will always impose a Guidelines sentence. As a result, the appellate standard of review has the same effect as an explicit pronouncement that a sentence within the Guidelines is presumed to be the appropriate sentence.

This clearly implicates a violation of the constitutional provisions of the Fifth Amendment in as much as Mr. Miedzianowski was certainly deprived of his liberty without Due Process of law.

CONCLUSION

For the Forgoing reason Petitioner JOSEPH J. MIEDZIANOWSKI respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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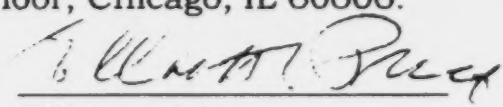
I hereby certify that on this 23rd day of May, 2006, one true and correct copy of the forgoing Petition for writ of certiorari was sent via Unites States Postal Service, first-class postage prepaid to Brain Netolss, Asst. United States Attorney, 219 S. Dearborn, Fifth Floor, Chicago, IL 60606.



Elliot T. Price

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Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court entered on June 16, 2005.

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Memorandum of the District Court for Northern District of Illinois Febraury 3, 2006.

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APPENDIX C:

Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court on limited remand Febraury 23, 2006. C-1

APPENDIX A:

Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court entered on June 16, 2005.

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued May 31, 2005
Decided June 16, 2005

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

Nos. 02-3238, 02-4193, 03-1446 & 03-1270

UNITED STATES OF AMERICA, Plaintiff-Appellee, V. LISSETT RIVERA, OMAR FELICIANO ALINA LIS, and JOSEPH MIEDZIANOWSKI, Defendants-Appellants.	Appeals from the United States District Court for the Northern District of Illinois Eastern Division. No. 98 CR 923 Blanche M. Manning, Judge.

Order

Lissett Rivera, Omar Feliciano, and Alma Lis have been convicted of conspiring to distribute more than five kilograms of cocaine. Rivera's sentence of 97

months' imprisonment is the subject of an opinion published contemporaneously with this order. Feliciano and Lis each received 360-month sentences. Joseph Miedzianowski, a police officer who used his position to protect this drug ring (in which he took part as a principal), has been convicted not only of the conspiracy but also of operating an organization through a pattern of racketeering and of additional offenses; his sentence is life imprisonment.

Many of the issues that defendants press on appeal have no potential to affect the judgments. For example, three defendants contend that the evidence did not permit a rational jury to conclude that the conspirators cooked powder cocaine into crack at 8543 West Bryn Mawr. Let us suppose that this is so. Take away the roughly 25 kilograms of cocaine said to have been processed there and more than 300 remain. The jury's decision that the defendants conspired to distribute five or more kilos, which authorizes a sentence as high as life imprisonment, is unaffected by details

about 8543 West Bryn Mawr. See *Griffin v. United States*, 502 U.S. 46 (1991). Nor is this issue material to the decision how much of the statutory maximum each defendant must serve. Conspiring to distribute more than 150 kilograms of cocaine places one at Level 38, the highest possible under the drug-distribution table. Amounts over 150 kilograms played no role.

Another irrelevance is Miedzianowski's contention that one of the instructions about predicate offenses under the RICO count is defective because it referred to the state crime as "extortion" rather than "intimidation," the caption on 720 ILCS 5/12-6. Shakespeare wondered "what's in a name?"; for purposes of federal criminal law the answer is

"nothing." Substance rather than nomenclature matters to the classification of predicate offenses, and we have held that the offense defined by 720 ILCS 5/12-6 meets the federal definition of extortion. See *United States v. McNeal*, 77 F.3d 938, 944—45 (7th Cir. 1996). Anyway, if this predicate offense were annulled, six would remain, four more than needed to support the RICO verdict.

Other arguments, though having some potential to affect the verdicts or sentences, have no oomph on the merits. For example, three defendants contend that the verdict is spoiled by the district judge's decision to admit as evidence a letter written by one conspirator who was not on trial. The letter is inadmissible, defendants insist, because the prosecution did not establish that any of them read it. But any statement made by a conspirator during, and in furtherance of, a conspiracy is admissible against all co-venturers. Whether any other conspirator heard (or, in this instance, saw) that statement is irrelevant; agency, not knowledge, is the theory of admissibility. The district judge made the necessary preliminary findings, see *United States v. Martinez de Ortiz*, 907 F.2d 629 (7th Cir. 1990) (en banc), so the letter was properly admitted. (For completeness we add that any error is harmless. The letter was just one raindrop in a downpour.)

Feliciano contends that during closing argument the prosecutor indirectly commented on his decision not to testify, thus impinging on the constitutional privilege against compulsory self-incrimination. When discussing counsel's cross-examination of one witness, the prosecutor remarked: "It's not the first time that a lawyer's come in with no defense and jumped up with no basis and called a witness a liar." Feliciano submits the reference to "no defense" could be understood to remark on the fact that he did not testify. This is indeed a possible reading; the prosecutor should have

omitted the phrase "with no defense". But the jury was unlikely to hear it as a request to draw an adverse inference from Feliciano's silence. No one proposed such an inference; the district judge sustained defense counsel's objection, see *Greer V. Miller,* 483 U.S. 756 (1987); the subject was not followed up. Given its context, one phrase in a single sentence was not likely to produce the forbidden inference, so there is no basis for reversal. See *United States v. Robinson,* 485 U.S. 25 (1988); *United States V. Sblendorio,* 830 F.2d 1382, 1390—94 (7th Cir. 1987). During a long trial slips of the tongue and ambiguities are inevitable; this is why courts frequently remark that defendants are entitled to fair trials but not perfect ones.

We have considered defendants' other arguments. None is persuasive, and none requires additional treatment in this order. All four convictions are affirmed, and we also hold that the Sentencing Guidelines have been applied properly.
Nos. 02-3238 *et al.*

Because the sentences of Feliciano, Lis, and Miedzianowski exceed the statutory minimum of 120 months, all three are entitled to limited remands under the approach of *United States V. Paladino,* 401 F.3d 471, 48 1—85 (7th Cir. 2005). This court will retain jurisdiction pending the district judge's response.

APPENDIX B:

Memorandum of the District Court for Northern District of Illinois Febraury 3, 2006.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Judge Blanche M. Manning
	)	
v.	)	Case No. 98 CR 923
	)	
JOSEPH MIEDZIANOWSKI,	)	
ALINA LIS,	)	
and OMAR FELICIANO	)	
Defendants.	)	

MEMORANDUM AND ORDER

This case is before the court on a limited remand by the Seventh Circuit Court of Appeals to determine whether this court would impose the defendants' original sentences had the sentencing guidelines been advisory rather than mandatory. See US. v. Paladino, 401 F.3d 471 (7th Cir. 2005). In Paladino, the court stated that:

> Upon reaching its decision (with or without a hearing) whether to resentence, the District Court should either place on the record a decision not to resentence with an appropriate explanation, or inform this court of its desire to resentence the defendant.
> Id. at 484 (citation and quotation marks omitted). In making this statement, the court should obtain the views of counsel but need not require the presence of the defendant. Id.

I. BACKGROUND

Joseph Miedzianowski, a former Chicago police officer, and others, including Alma Lis and Omar Feliciano, were charged with conspiring to commit acts of racketeering and to distribute narcotics. The sixth superseding indictment contained 14 counts. Count 1 charged Miedzianowski and another defendant with racketeering conspiracy, in violation of 18 U.S.C. §1962(d). Count 2 charged Miedzianowski and the other defendants with drug conspiracy, in violation of21 U.S.C. § 846. As for Counts 3-14, Miedzianowski was the only defendant who went to trial on these counts. At the conclusion of the Government's case in chief, it dismissed Counts 3-6. Counts 7-14 were subsequently renumbered as Counts 3-10. After a 13 week trial, the jury found Miedzianowski guilty of RICO conspiracy (Count 1), conspiracy to possess with intent to distribute narcotics (Count 2), conspiracy to commit extortion (Counts 3 and 7), extortion (Count 4), possession with intent to distribute cocaine (Count 5), unlawful possession of a firearm (Counts 6 and 9), and distribution of cocaine (Counts 8 and 10). The jury also found Lis and Feliciano guilty of conspiracy to possess with intent to distribute narcotics (count 2).

II. ANALYSIS

In determining whether it would impose the same sentence had the guidelines been advisory rather than mandatory, the court has reviewed the written submissions of the parties as to this remand, and their presentence reports (PSR). As required under 18 U.S.C. § 3 553(a), the court has considered the nature and circumstances of the offense, the history and characteristics of the defendant, the purpose for imposing the sentence,[1] the kinds of sentences

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[1] According to § 3 553(a), the sentence imposed should: (a) reflect the seriousness of the offense, promote

available, the advisory guideline ranges, and the need to avoid unwarranted sentencing disparities.

A. Joseph Miedzianowski

After his conviction, the United States Probation Office ("Probation") completed a PSR for Miedzianowski. Using the 2001 edition of the United States Sentencing Guidelines ("the guidelines"), Probation calculated Miedzianowski's total offense level as a 46 with a criminal history category of I, for which the guideline range of imprisonment was life. At sentencing, the court overruled Miedzianowski's objections to the PSR. The court sentenced Miedzianowski to serve a term of life imprisonment on Counts 1 and 2, five years each on Counts 3, 4, 6, 7, 8, 9, and 10 to be served concurrently, and a term of five years on Count 5 to be served consecutive to the life sentence imposed on Count 2.

Miedzianowski now requests that the court reduce his sentence to the mandatory minimum as to Count Two of ten years (120 months) in prison. Miedzianowski bases this request on various factors, including his supportive family, his lack of a criminal history, and the commendations he received while a police officer. He also asserts that the 120-month sentence would protect the public from further crimes and "would probably be a sufficient deterrent for him."

To the extent that Miedzianowski's argument relies on post-sentencing conduct or events, it fails as

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respect for the law, and provide just punishment for the offense; (b) afford adequate deterrence to criminal conduct; (c) protect the public from further crimes of the defendant; and (d) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

such conduct or events are not relevant on a Paladino remand. US. v. Re, 419 F.3d 582, 584 (7th Cir. 2005) ("in a Paladino remand the conduct or circumstances that bear on the § 3553(a) factors must have been in existence at the time the original sentence was imposed....Post-sentencing events or conduct simply are not relevant to th[e Paladino] inquiry."). As to this court's consideration of the factors listed by Miedzianowski in light of Booker, the court already considered them at the original sentencing and the court would not have imposed a different sentence had the guidelines been advisory. This court sat through Miedzianowski's 13-week trial and vividly recalls the numerous witnesses who testified about Miedzianowski's significant criminal conduct and his abuse of position as a Chicago police officer. Indeed, in rejecting Miedzianowski's objections to his PSR at the original sentencing this court found that:

> -- there was "sufficient evidence to support Probation's finding that Miedzianowski possessed with intent to distribute over 150 kilograms of cocaine and over 1.5 kilograms of cocaine base" *US. v. Miedzianowski,* No. 98 CR 923, 2003 WL 280582, at * 5 (N.D. Ill. Feb. 6, 2003);
>
> — Miedzianowski had obstructed justice by committing perjury at trial, *id.,* and;
>
> — Miedzianowski was a leader/organizer of a criminal conspiracy which involved five or more people. *Id.* ("Miedzianowski exercised control of the operation, recruited members, and threatened members to keep them in line. For example, numerous witnesses testified that Miedzianowski acted as a mediator and de facto judge when the coconspirators got into disputes over drug debts and prices. Likewise, before the coconspirators would rob and cheat each other, they would seek

> Miedzianowski's approval. Miedzianowski recruited persons into the conspiracy to supply and distribute drugs. In addition, as he did with Sam Castro, Miedzianowski instructed members of the conspiracy how to be successful drug dealers.")

Moreover, at least one wiretap admitted at trial indicated that Miedzianowski, as a result of his position as a police officer, assisted Sam Castro, a co-defendant in this case, in identifying plainclothes law enforcement officers and ascertaining the target of the officers' stakeout.

In his position paper with respect to this *Paladino* remand, Miedzianowski notes that this court stated during sentencing that it imposed the original sentence with a "heavy heart." It is true that the court so indicated — the court does not relish putting anyone in prison for the rest of his or her life. But the statement merely reflected the court's recognition of the impact the sentence would have on Miedzianowski's family, *see* transcript of January 24, 2003 at 56 ("I have a heavy heart in doing this, and I truly sympathize with your family") and was not an indication that it believed the sentence was

unwarranted.

In short, Miedzianowski's grievous abuse of his police badge, the invidious nature of Miedzianowski's criminal activities, the length of time over which they occurred, the breadth of the effect they have had on other people's lives, and the amount of drugs at issue, this court finds that it would not have sentenced Miedzianowski differently had the guidelines been advisory. Miedzianowski's arguments to the contrary wholly fail to take these factors into account. The court believes, as it did at the time of the original sentencing, that the sentence imposed is reasonable and is necessary to protect the public and reflect the seriousness of Miedzianowski's offenses.

B. *Lis and Feliciano*

After having reviewed these defendants' PSRs and the parties' position statements on remand, as well as considering the factors under 18 U.S.C. § 3553(a), the court cannot conclude that it would have imposed the same sentences as to these two defendants had it known that the guidelines were

advisory rather than mandatory.

ENTER

/s/_____
Blanche M. Manning
United States District Judge

DATE: February 3,2006

APPENDIX C:

Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court on limited remand Febraury 23, 2006.

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued May 31, 2005
Decided February 23, 2006

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

Nos. 02-3238, 02-4193, 03-1446 & 03-1270

UNITED STATES OF AMERICA, Plaintiff-Appellee, V. LISSETT RIVERA, OMAR FELICIANO ALINA LIS, and JOSEPH MIEDZIANOWSKI, Defendants-Appellants.	Appeals from the United States District Court for the Northern District of Illinois Eastern Division. No. 98 CR 923 Blanche M. Manning, Judge.

Order

We remanded to the district judge under ***United States v. Paladino,*** 401 F3d 471, 483-84 (7th Cir. 2005), so that she could tell us whether the additional discretion provided by *United States v. Booker, 543* U.S. 220 *(2005),* would have affected the defendants' sentences.

The judge gave an affirmative answer with respect to Qmar Feliciano and Alma Lis. Both of these defendants now seek full remands for resentencing, and the United States concedes that defendants are entitled to that relief. Accordingly, these sentences are vacated, and the cases are remanded for resentencing. Nos. 02-4 193, 03-1446 & 03-1270

The judge concluded, however, that additional discretion would not have led to a lower sentence for Joseph Miedzianowski. We must decide, given this knowledge, whether his sentence is plain error--for Miedzianowski had not raised an argument in the district court concerning the allocation of fact-finding authority between judge and jury. We hold that plain error did not occur, because the sentence is not an unjust one. Although it is severe (life imprisonment), it is within the Guideline range, which remains the starting point and a presumptively reasonable disposition after *Booker*. See *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005).

The district court's memorandum on remand concluded that the severity, number, and duration of Miedzianowski's crimes, coupled with the fact that he committed these offenses while sworn to uphold the law as a police officer, justify the greatest non-capital sanction available. Miedzianowski does not contend that any of the statutory considerations, see 18 U.S.C. *§3553(a)*, demonstrates that his sentence is unreasonable. Instead he devotes most of his memorandum to asking us to disregard the legal analysis adopted in *Mykytiuk*. We see no reason to do that.

The district judge did not address the *§3553(a)* factors at Miedzianowski's sentencing--understandably, as it occurred before *Booker*. But that does not turn a reasonable sentence into plain error; indeed, it would not be error as a rule even after *Booker*, as *United States v. Dean*, 414 F.3d 725 (7th Cir. 2005), holds. A judge should discuss on the record substantial arguments that a particular consideration calls for lenity, see *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005), but Miedzianowski does not identify any argument that he made and the district judge ignored at his sentencing. And, to repeat, our review is limited to a search for plain error; in *Cunningham* the argument that succeeded on appeal had been preserved in the district court, where here it was not.

Miedzianowski's sentence is affirmed.